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6

7 **IN THE UNITED STATES DISTRICT COURT**
8 **DISTRICT OF ARIZONA**

9 Anthony Fontana)
10)

11 Plaintiff)

No.

12 v.)
13)

14 **COMPLAINT**

15 United of Omaha Life Insurance)
Company,)
16)

17 Defendant.)
18)

19 Comes now the Plaintiff, Anthony Fontana, and by his attorney, PAUL
20 J. DOMBECK, and complaining against the defendant, states:

21 **JURISDICTION AND VENUE**
22

23 I.

24 Jurisdiction of the court is based upon the Employee Retirement Income
25 Security Act of 1974 (ERISA); and in particular, 29 U.S.C. §§1132(e)(1) and 1132(f).
26 Those provisions give the district courts jurisdiction to hear civil actions brought to
27 recover benefits due under the terms of employee welfare benefit plans which, in this
28 case, consists of group short term and long term disability benefit plans to employees

1 of Scottsdale Healthcare Corp. ("SHC") set forth as Scottsdale Healthcare Corp,
2 Group Short Term and Long Term Disability Plan ("Plans" or "Plan(s)" or "Plan")
3 administered and/or adjudicated by Plan(s) Fiduciary, United of Omaha Life
4 Insurance Company, and/or Mutual of Omaha ("United of Omaha"), provided by SHC
5 to plaintiff Anthony Fontana, one of its employees. In addition, this action may be
6 brought before this Court pursuant to 28 U.S.C. §1331, which gives the District Court
7 jurisdiction over actions that arise under the laws of the United States.

8 II.

9 The ERISA statute provides, at 29 U.S.C. §1133, a mechanism for
10 administrative or internal appeal of benefit denials. Those avenues of appeal have
11 been exhausted.

12 III.

13 Venue is proper in the Phoenix District of Arizona. 29
14 U.S.C. §§1132(e)(2), 28 U.S.C. §1391, ERISA § 502(e), because the "breach" of the
15 subject disability benefit Plans occurred in Maricopa County, Arizona, and because
16 defendant may be found in Maricopa County Arizona.

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19 **NATURE OF ACTION**

20 IV.

21 This is a claim seeking an award to Plaintiff of disability income benefits
22 pursuant to the aforereferenced subject Plans, said Plans designated in Plan
23 Documents as Group Policy Number (GP) GUD-09P58 by United of Omaha,
24 providing group Short Term Disability ("STD") and Long Term Disability ("LTD")
25 benefits to employees of SHC; said Plans are provided by United of Omaha and
26 administered by United of Omaha under group control numbers and/or policy
27 numbers not limited to Plan Number GUD-09P58 and Claim Number 111810000301.
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1 This action, seeking recovery of benefits, is brought pursuant to §502(a)(1)(B) of
2 ERISA 29 U.S.C. §1132(a)(1)(B).

3
4 **THE PARTIES AND THE DISABILITY PLANS**

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6 V.

7 That the Plaintiff is a resident of the County of Maricopa, State of
8 Arizona, and has been at all times hereinafter stated.

9 VI.

10 That the Plans, as described in the Plan(s) documents, are, upon
11 information and belief, welfare benefit plans providing respectively Group Short Term
12 Disability and Group Long Term Disability for employees of SHC.

13 VII.

14 That Employer SHC is a Plan(s) fiduciary per 402(a) of ERISA, and upon
15 information and belief, is an Arizona corporation licensed to and doing business in
16 Arizona, and further that Defendant United of Omaha, is a Nebraska corporation
17 licensed to and doing business in Arizona.

18 VIII.

19 That SHC, is the LTD Plan(s) administrator, and maintains health care
20 coverages that are funded through Plan Number GUD-09P58 and/or Claim Number
21 111810000301, issued by United of Omaha, and that claims upon said coverages are
22 in actuality functionally administered and/or adjudicated by United of Omaha, and that
23 SHC was at all times relevant the employer of Plaintiff Anthony Fontana.

24 IX.

25 That as claims adjudicator, defendant United of Omaha reviews disability
26 claims for the purpose of approving, adjusting, denying or issuing benefits, based
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1 upon information that United of Omaha and SHC generate.

2 X.

3 That the Plaintiff, as an employee of SHC was eligible for certain
4 employee benefits, including disability plans and policies, as per the terms and
5 conditions of the written Plans, as outlined on Summary Plan Description brochures
6 and/or Group Benefit Plan documents offered to, disseminated amongst and granted
7 to employees of SHC, including but not limited to the benefits described as a Group
8 Policy contract between United of Omaha as the Company and SHC, as a subscriber
9 to the Plan number GUD-09P58 and Claim Number 111810000301. That Anthony
10 Fontana elected and/or was provided benefit coverage paying 66 2/3% of monthly
11 gross salary, and paid all premiums therefor as required.

12 XI.

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14 At all times relevant hereto, the subject Plans constituted "employee
15 welfare benefit plan(s)" as defined by 29 U.S.C. §1002(1); and incident to his
16 employment, Anthony Fontana received coverage under the Plans as a "participant"
17 as defined by 29 U.S.C. §1002(7). This claim relates to benefits under the foregoing
18 Plans.

19 XII.

20 On or about October of 2007, Mr. Fontana began working for SHC, in
21 Scottsdale, Arizona as a Sonographer Technician. His position required the claimant
22 to work at the highest level of mental acuity to process images, and physical ability
23 as required to assist patients in getting in and out of the sonography bed and prepare
24 patients to obtain appropriate imaging as required and move heavy medical
25 equipment.

26 ///

STATEMENT OF FACTS

XIII.

At all appropriate times, Anthony Fontana was a full-time employee of SHC, and he was actively employed at SHC until on or about May 31, 2011 when he ceased working due to severe back pain. From May 31, 2011 until the present Anthony Fontana has not engaged in any substantial gainful activity.

XIV.

On or around May 31, 2011, and while still maintaining status as a SHC employee, Plaintiff Anthony Fontana made a timely application under the subject Short Term Disability (STD) Plan, under claim number(s) not limited to 111810000301, stating that on or about May 31, 2011 he met the Plan(s) definitions of disability on account of medical conditions which rendered him unable to perform at least one of the material duties of his regular job on a part-time or full-time basis.

XV.

Said medical conditions were specifically, severe chronic back pain due to spinal impairments requiring spinal surgical procedures and specifically resulting in failed spinal surgical procedures and the conditions, limitations and sequella therefrom, and for which the plaintiff supported his claim for LTD benefits with medical records and reports and other evidence certifying his disability.

XVI.

Based upon this application and supporting evidence United of Omaha initially awarded the plaintiff STD benefits from May 31, 2011, and paid said benefits through, the maximum 90-day STD benefit payment duration limitation, contemporaneous with which the plaintiff also completed a timely application for LTD benefits and received LTD benefits from the defendant until August 21, 2014, a time period during which the United of Omaha subject STD and LTD Plans stated in

1 pertinent part the following “Own-Occupation” definition of disability: “...because of
2 an injury or sickness, a significant change in your mental or physical functional
3 capacity has occurred in which you are prevented from performing at least one of the
4 material duties of your regular job on a part-time or full-time basis”.

5 XVII.

6 The Subject LTD Plan disability-definition broadens after the first 24
7 months, stating in pertinent part: “Disability and Disabled mean you are unable to
8 perform all of the material duties of any gainful occupation.”

9 XVIII.

10 During the time-period of the LTD “own-occupation” standard, on or
11 around September 3, 2013, the plaintiff was awarded Social Security Disability (SSDI)
12 benefits retroactive to May 31, 2011.

13 XIX.

14 The SSDI disability definition (“inability to engage in any substantial
15 gainful activity by reason of any medically determinable physical . . . impairment” that
16 is of “such severity that [the claimant] . . . cannot, considering his age, education, and
17 work experience, engage in any other kind of substantial gainful work which exists
18 in the national economy, regardless of whether such work exists in the immediate
19 area in which he lives.” See 42 U.S.C. § 423(d)(1)(A), (2)(A)”) is at least as strict as
20 the broadest United of Omaha “Any Occupation” disability definition under the subject
21 LTD Plan because the Social Security standard offers no definitional leniency for a
22 claimant’s past earnings or location, See *Montour v. Hartford* 588 F3d. at 636; cf.
23 *DeLisle v. Sun Life Assurance Co. of Canada*, 558 F.3d, 440, 446 (6th Cir. 2009)

24 XX.

25 During the latter part of the subject LTD Plan’s “own occupation”
26 disability period, specifically on or around June of 2014, United of Omaha hired a
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1 defense medical examination consultant (Jon D. Zoltan M.D.) to examine the Plaintiff
2 and write a consultative opinion; and consultant Zoltan's opinion was that the plaintiff
3 could sustain competitive work at the "light" exertional level.

4 XXI.

5 Also during this "own occupation" disability period, Defendant United of
6 Omaha also conducted "sub-rosa" surveillance of the plaintiff's activities and
7 movements, specifically recording observations of the plaintiff on or about the dates
8 of September 10th thru 12th of 2013 and March 15th, 17th and 18th of 2014 and June
9 18th and 19th of 2014; and United of Omaha during all of this time continued to pay the
10 benefits to the plaintiff until August 21, 2014.

11 XXII.

12 Prior to consultant-Zoltan's report, but also during this "own occupation"
13 disability period, on or around September 11, 2013, Defendant United of Omaha also
14 had hired a physical therapy practitioner to conduct a functional capacity examination
15 (FCE) of the plaintiff, and upon information and belief United of Omaha did not
16 provide this vendor with motion footage from the surveillance; this consultant's
17 conclusion, in contrast to that of consultant Zoltan, was that the plaintiff could only
18 sustain a "sedentary" exertional level work.

19 XXIII.

20 Shortly after United of Omaha's FCE vendor completed the report for
21 United of Omaha concluding that the plaintiff could only sustain a "sedentary"
22 exertional level, upon information and belief United of Omaha then sent this FCE
23 vendor a copy of the actual motion footage of the surveillance; after viewing the
24 motion footage, the FCE vendor sent United of Omaha a supplemental report
25 concluding that the motion footage did not change the earlier conclusion that the
26 plaintiff could only sustain a sedentary level of work.
27
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XXIV.

By August 28, 2014, United of Omaha informed the plaintiff that pursuant to an alleged further review of Plaintiff's medical evidence, that the plaintiff's impairments and functional limitations supposedly no longer met the requisite definition of disability, which after the August 21, 2014 had broadened to the "any occupation" standard.

XV.

On or around September 5, 2014 the plaintiff, as yet unrepresented by counsel, asked United of Omaha, both over the phone and in writing, for a copy of the claim file and/or administrative record, and in response United of Omaha forwarded to the plaintiff some portions of the administrative record that did not include motion footage of the surveillance that United of Omaha and its consultants had cited in their reports, and had also cited in its August 28, 2014 denial of benefits, rather regarding the surveillance United of Omaha only provided the Plaintiff with a limited number of select still-photo type images taken from the footage.

XXVI.

Then on or around December 1, 2014 Plaintiff, through counsel, requested in writing (for the second time), pursuant to 29 U.S.C. §1132(c)(1), a copy of those portions of the administrative record that United of Omaha had not already provided to the plaintiff, and as part of this request specifically also requested that United of Omaha forward a copy of the 'full-motion' surveillance footage, specifically explaining to United of Omaha that said surveillance was referenced in United of Omaha's August 28, 2014 denial letter as well as in consultant Zoltan's report; Following this communication however United of Omaha still did not produce the motion footage nor otherwise respond to Plaintiff's request regarding the motion footage.

XXVII.

On or about February 24, 2015, Anthony Fontana submitted to Defendant United of Omaha in accordance with 29 U.S.C. § 1133 an administrative appeal of the August 28, 2014 denial of his LTD benefits. In support of this appeal, Plaintiff Fontana submitted additional medical evidence from treating and examining physicians and vocational and other sources demonstrating substantially that his condition had not improved, and that his condition precluded him from performing any alternative occupation and thereby that at all relevant times he met and continued to meet the Plan(s)' requisite disability definitions.

XXVIII.

In this February 24, 2015 appeal, the Plaintiff (for the third time) also specifically reminded United of Omaha that on or around December 1, 2014 Plaintiff through counsel had requested United of Omaha forward a copy of the 'full-motion' copy of the surveillance footage referenced in United of Omaha's August 28, 2014 denial, and that to date United of Omaha had not forwarded copies of this footage, and thus the plaintiff had not been able to obtain comprehensive opinions from Mr. Fontana's physicians regarding the alleged exertions depicted in that motion footage; and Plaintiff also advised United of Omaha that to the extent that United of Omaha continued to rely for denial upon any of the motion-footage, United of Omaha's refusal to disclose that footage undermined the plaintiff's ability to understand and/or address issues arising from those images and consequently undermined the plaintiff's ability to demonstrate to United of Omaha that he continues to meet the requisite Plan definition, which in turn failed to afford to Plaintiff the 'full and fair review' contemplated by contemporary ERISA jurisprudence, *e.g.*, *Harris v. Aetna Life Insurance Company*, 379 F.Supp 2d 1366, 1371-1372.

XXIX.

In his February 24, 2015 appeal Mr. Fontana also specifically advised

1 United of Omaha that it was apparent that United of Omaha had misconstrued at
2 least the surveillance still-images that United of Omaha had provided, and also that
3 it was unclear from all of United of Omaha's evidence, including consultative opinions
4 and reports, whether United of Omaha's consultants had seen and relied upon motion
5 footage from the surveillance and/or whether United of Omaha's consultants had only
6 seen still-photo depictions of the surveillance footage.

7 XXX.

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9 In his February 24, 2015 appeal the plaintiff also specifically advised
10 United of Omaha that it was apparent that United of Omaha and its consultants had
11 also failed to properly consider Mr. Fontana's spinal impairments, including
12 documentary evidence of worsening pain with activity.

13 XXXI.

14 In his February 24, 2015 appeal Mr. Fontana also specifically referenced
15 medical, vocational, and functional capacity examinations and reports all of which
16 concluded and/or otherwise demonstrated that the claimant as a result of his
17 conditions and functional limitations at all pertinent times could not sustain any type
18 of competitive employment, and pursuant to which the plaintiff requested that United
19 of Omaha reverse the August 28, 2014 denial and reinstate Mr. Fontana's LTD
20 benefits.

21 XXXII.

22 In support of his February 24, 2015 appeal request, the plaintiff also
23 specifically and in writing brought the defendant's attention to each of the following
24 arguments and issues:

25 A) That from the opinions and conclusions expressed in Consultant Zoltan's
26 June 19, 2014 report, it is apparent Zoltan viewed only 'stills' from the
27 surveillance footage, and that the surveillance vendor did not observe any
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1 activity suggesting an ability by this plaintiff to sustain full-time competitive work
2 at any exertional level, and that the plaintiff was not observed doing anything
3 inconsistent with his claimed limitations.

4 B) The written report of the September 10th -12th, 2013 surveillance allegedly
5 depicted the plaintiff lifting a garbage bag and a box, but that since United of
6 Omaha did not provide access to the motion-footage the plaintiff and his medical
7 providers could not assess how heavy or large the bag and the box were.

8 C) United of Omaha's own consultative medical assessment was that the
9 plaintiff was restricted from repeatedly lifting more than 10 lbs, yet the
10 surveillance reports did not state that the plaintiff had repeatedly lifted more than
11 10 lbs.

12 D) United of Omaha's 2013 Functional Capacity examiner also concluded that
13 the 2013 surveillance footage did not depict lifting above the 10-lbs limitation.

14 E) With the 'still' surveillance images provided by United of Omaha it was not
15 possible to determine if the plaintiff was wincing or otherwise having difficulty
16 lifting the alleged bag and/or box and/or for how long and over what distance(s)
17 he lifted/carried them.

18 F) The 2013 surveillance report also did not depict consequential pain,
19 discomfort or decompensation from those exertions, including whether the
20 plaintiff had to rest or decompensate after the depicted activities.

21 G) That the 2013 surveillance report alleges the plaintiff was carrying a "medium
22 sized dog", by which United of Omaha and/or its vendors and agents imply a
23 dog of 25lbs, but that the Plaintiff owns only a 10-12 lbs "toy-breed" Pomeranian
24 dog, and that this inaccuracy was compounded by consultant Zoltan referencing
25 the surveillance report and proffering that because of the plaintiff's supposed
26 ability to lift the "medium sized dog" described by the surveillance vendor, that
27 the plaintiff's functional capacity is *inconsistent* with a September 11, 2013
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1 functional capacity exam ordered by United of Omaha which concluded that this
2 plaintiff cannot do anything more strenuous than *sedentary* work; and thus if
3 Zoltan viewed the motion-footage (that United of Omaha still had not turned over
4 to Plaintiff) he distorted the size of the dog, but alternatively if he viewed only
5 stills, his conclusions were nevertheless based upon the surveillance vendor's
6 distortion.

7 H) Consultant Zoltan's report contains other improper speculation, hearsay,
8 distortions and wrong information including that:

9 i) Zoltan concludes the plaintiff can do light work substantially as a result
10 of Zoltan's conclusion that the plaintiff can lift 10 lbs occasionally, but
11 that Zoltan does not meaningfully consider other significant factors in
12 evidence such as interruptions with work activities flowing from the
13 plaintiff's requirement of lying down a significant portion of each day,
14 and also Plaintiff's diminished concentration and attention because of
15 chronic pain, and also the necessity for additional work-breaks.

16 ii) Zoltan also references and in pertinent part relies upon a vague
17 statement from the 2013 Liberty Mutual Functional Capacity Evaluation
18 that alleges the plaintiff was '*walking the dog a little more than indicated*',
19 yet fails to consider that the plaintiff's doctor told the plaintiff to walk as
20 a form of home-exercise, particularly considering that neither the United
21 of Omaha physical therapy FCE vendor nor consultant Zoltan explain
22 what is meant by "more than indicated"; and that there is no indication
23 Zoltan observed the plaintiff for the extended time-period necessary to
24 establish this assertion, and that if there is some surveillance evidence
25 establishing how long the plaintiff walks his dog, this has not been
26 disclosed to the plaintiff.

27 iii) Zoltan reported that the plaintiff entered the examination room with
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1 more normal gait, then displayed more abnormal gait during the
2 examination and then (based upon the hearsay statement of an
3 unidentified Zoltan employee) a more normal gait once again after the
4 examination, yet declined to consider or acknowledge the effect upon
5 the plaintiff of the time and exertions that the plaintiff was required to
6 make as part of the examination.

7 iv.) Zoltan's actual physical examination of the plaintiff showed
8 tenderness at various levels of the plaintiff's spine and numbness on
9 certain areas of the feet, yet Zoltan concludes that sensory tests are
10 'inconsistent' without explaining how or why that is the case or how the
11 plaintiff would be expected to sustain employment in light of those
12 symptoms.

13 v.) That United of Omaha asked Zoltan to focus more upon the 2013
14 surveillance with the result that there was scant mention of the latest
15 (2014) surveillance in Zoltan's report, a report which indicated less
16 exertional-type activity than the 2013 surveillance, and no exertions
17 suggestive of a sustained sedentary work capacity.

18 vii) that consultant Zoltan's response to United of Omaha's question
19 number 4 (regarding consistency of casual versus examination
20 observations) appears to indiscriminately cobble together Zoltan's
21 foundationally suspect conclusions regarding the 2014 observations with
22 observations by the 2013 United of Omaha functional capacity examiner
23 six months prior, with the effect that Zoltan's conclusion is based on a
24 distortion of the factual evidence.

25
26 I) The 2013 functional capacity examination purchased by United of Omaha
27 around the time of the September 2013 surveillance indicates that Mr. Fontana
28 had difficulties with several activities that were interrupted due to pain, and that

1 Mr. Fontana was unable to complete testing. These observations were found by
2 the FCE examiner to be consistent with the plaintiff's subjective complaints,
3 including higher blood pressure confirming pain, and also with the examiner's
4 observations as to how the plaintiff was performing the FCE test, indicating
5 specifically that he was compensating for pain and not exaggerating; and that
6 it was apparent from his report that soon after the functional capacity
7 examination, the examiner was able to view the actual motion footage of the
8 2013 surveillance and thereby only noted some minor differences from the
9 examination compared to the surveillance activity, concluding that the plaintiff
10 could still only do sedentary work.

11 J) Zoltan's 2014 report on the other hand appears to conclude that the plaintiff
12 should be able to perform his prior duties which Zoltan classifies as 'light duty',
13 and that because the claim definition had already transitioned from "own-
14 occupation" to "any occupation", it is unclear why Zoltan and United of Omaha
15 were focused upon supposed discrepancies between the 2013 FCE and the
16 2013 surveillance, both of which implicated the "own occupation" time period,
17 whereas the 2014 surveillance which depicted significantly less plaintiff-activity
18 or suggestion of a sedentary capacity is the surveillance that is contemporary
19 with Zoltan's 2014 examination.

20 K) It is apparent the records given by United of Omaha to Zoltan were older
21 records from the time-period during which United of Omaha was paying
22 benefits, and that some of those were records from a doctor who was no longer
23 seeing the plaintiff.

24 L) United of Omaha's vocational consultant was presented primarily with
25 Zoltan's report and a general job description that was inconsistent with the
26 plaintiff's actual job description, and that primarily based upon these documents
27 this vocational consultant concluded that the plaintiff could do his prior job,
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1 which according to the Dictionary of Occupational Titles (DOT) code is
2 considered 'light duty'.

3 M) This vocational consultant's conclusion that the plaintiff could do 'light duty'
4 is primarily based upon Zoltan's report, which in turn was substantially based
5 upon irrelevant or erroneous information such as the misrepresentation of the
6 size of the plaintiff's dog and the outdated 2013 surveillance.

7 N) This vocational consultant did not interview the plaintiff nor request a job
8 description from the plaintiff's employer, information which would likely have
9 clarified that the plaintiff's job was classified at no less than the "medium" if not
10 the "heavy" exertional category.

11 O) Upon information and belief United of Omaha's vocational consultant was not
12 provided by United of Omaha with documents and/or information that United of
13 Omaha's functional capacity vendor who conducted the September 2013
14 examination had concluded even after reviewing the surveillance motion footage
15 that the plaintiff was still in the "sedentary" exertional category, and as a result
16 the vocational vendor erroneously concluded that the plaintiff could do 'light
17 duty'.

18 P) The plaintiff was awarded Social Security (deemed *below* sedentary
19 exertional capacity) around the time of the first surveillance (September 3,
20 2013), which was at a time that United of Omaha acknowledged at least that the
21 plaintiff had no more than a sedentary capacity; and that moreover the Social
22 Security disability award was also contemporaneous with the subject Plan's
23 transition from the 'Own Occupation' to the Any Occupation' disability definition.
24

25 Q) With his February 2015 appeal the Plaintiff requested that in light of
26 consultant Zoltan's suspect methodology and conclusions, it was evident that
27 Zoltan and United of Omaha were operating pursuant to a conflict of interest,
28 and thus that under current prevailing Ninth Circuit jurisprudence the plaintiff is

1 entitled to receive from United of Omaha information pertinent to any such
2 conflict, such as statistics on how often consultant Zoltan was hired by United
3 of Omaha and how often consultant Zoltan found claimants 'not disabled',
4 because without this information the plaintiff could not assess the extent to
5 which any such conflict of interest might have compromised the review process
6 and decisions about his claim, and the denial of this information would thereby
7 be a denial of the 'full and fair review' process mandated by ERISA provisions
8 and the court decisions interpreting those provisions; United of Omaha failed to
9 respond to this request.

10 XXXIII.

11 Despite Mr. Fontana's submission of these arguments, evidence and
12 requests, and without turning over or otherwise even mentioning the surveillance
13 motion footage that Plaintiff had now already requested three times, United of
14 Omaha, on or about May 29, 2015, issued a "final" administrative denial of Mr.
15 Fontana's LTD claim, alleging in pertinent part that the "*medical evidence does not*
16 *support restrictions and/or limitations that would preclude Mr. Fontana from*
17 *performing the material duties of his regular occupation from August 22, 2014 and*
18 *ongoing*".

19 XXXIV.

20
21 As indicated in United of Omaha's May 29, 2015 final denial, United of
22 Omaha retained to review Plaintiff's appeal evidence and arguments another peer
23 ("paper") review consultant (William M. Strassberg, M.D.) from University Disability
24 Consortium, who upon information and belief is another vendor specialized in
25 providing disability reports for insurance companies; however United of Omaha did
26 not ask or otherwise have United of Omaha's prior consultants respond to the
27 plaintiff's questions and concerns regarding those consultants' methodologies and
28 conclusions.

1 XXXV.

2 United of Omaha's retention of new consultant Strassberg during its
3 appeal review followed by the issuance of United of Omaha's final denial on May 29,
4 2015 denied full and fair review to the plaintiff because with its final denial United of
5 Omaha expressly stated its intent to close the administrative record to the input of
6 further evidence, thereby denying the plaintiff an opportunity to submit evidence
7 responsive to the conclusions of consultant Strassberg.

8 XXXVI.

9
10 United of Omaha's May 29, 2015 assertion that by retaining new
11 consultant Strassberg United of Omaha had provided a full and fair review of the
12 plaintiff's appeal is also false because United of Omaha still had not provided the
13 surveillance motion footage that the plaintiff had repeatedly requested, nor clarified
14 what knowledge or opinions, if any, its earlier consultants had of the surveillance, nor
15 permitted the plaintiff's treating providers a chance to review the motion footage.

16 XXXVII.

17 United of Omaha's May 29, 2015 final denial also failed to address the
18 plaintiff's stated appeal concerns regarding United of Omaha's vocational report,
19 specifically that United of Omaha's vocational consultant failed to interview the
20 plaintiff and instead based his conclusions primarily upon consultant Zoltan's
21 foundationally suspect conclusions; and also that United of Omaha's vocational
22 consultant was not provided with nor otherwise obtained a complete description of
23 the plaintiff's job, a job which had greater exertional requirements than the vocational
24 consultant acknowledged.

25 XXXVIII.

26 Consultant Strassberg declared in his report that he was critical of the
27 examination by and the methods of Plaintiff's occupational capacity provider (Mary
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1 Louis Hymen, MOT, OTR/L, FAOTA); however United of Omaha's stated intent of
2 closing the record to new evidence via its May 29th denial denies full and fair review
3 because it denies therapist Hymen an opportunity to respond to consultant
4 Strassberg's criticisms.

5
6 XXXIX.

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8 Consultant Strassberg's report also places into the record allegations
9 about supposed drug non-compliance by the plaintiff and/or other drug issues, and
10 thereby claims for the first time with its final denial that the plaintiff's credibility is
11 thereby diminished, asserting in his report that he interpreted medical records to
12 mean that the plaintiff wasn't taking his prescription medication correctly and was
13 improperly taking medical-THC and also had a positive (November 2014) test for
14 methamphetamine use; inferences and conclusions that United of Omaha relied upon
15 in their final denial.

16 XL.

17 By asserting in its final denial that it intended to close the administrative
18 record, United of Omaha denied full and fair review to the plaintiff by denying the
19 plaintiff an opportunity to place the following responsive facts into the evidence: 1)
20 that consultant Strassberg misconstrued a general prescription drug use warning he
21 found in a consultative record as evidence that the plaintiff had violated the provider's
22 prescription use policy; 2) that the plaintiff was discharged by his earlier pain
23 management doctor for merely asking about medical-THC; 3) that the plaintiff's
24 current pain management doctor did not object to the plaintiff incorporating medical-
25 THC into his medication regimen, and that after only a few months the plaintiff
26 discontinued THC use as he found it only minimally helpful; 4) the plaintiff has never
27 used methamphetamine and his pain management doctor has in fact clarified that the
28 evidence indicates the single November 2014 lab test is a "false positive".

XLI.

Because United of Omaha did not give the plaintiff and his doctors a chance to respond, United of Omaha's new denial-rationale (supposed drug infractions), effectively moved the 'goal-post' of what United of Omaha required the plaintiff to demonstrate in order to meet the requisite Plans' disability definition(s), and thereby United of Omaha has denied the plaintiff a full and fair review as contemplated by ERISA. *See e.g., Sterio v. HM Life, 369 Fed. Appx. 801, 805 (9th Cir. 2010) (Tacking a new reason for the denial onto a final denial letter can be considered an abuse of discretion and a procedural violation, as it forecloses the insured from addressing the basis for the denial).*

XLII.

On or around June 3, 2014, a representative of United of Omaha contacted Plaintiff's counsel over the phone and advised that United of Omaha would be issuing a final denial of the plaintiff's claims, following which plaintiff through counsel issued on June 4, 2015 yet another written (fourth) request for the surveillance footage. United of Omaha finally sent the surveillance footage along with a written copy of the final denial dated May 29, 2015, said mailing received by the plaintiff on or about June 6, 2015.

XLIII.

Consultant Strassberg either did not view the actual surveillance motion images or he substantially distorted what he did see; Strassberg's report declares that the March 17, 2014 surveillance shows that the plaintiff walked with ease and with fluid movements and/or drove uninterruptedly for 45 minutes and was able to enter and leave his car without any difficulty, whereas the actual images clearly depict the plaintiff moving slowly and with difficulty and do not depict a 45-minute drive.

XLIV.

United of Omaha's surveillance vendor declares in his report of the September 2013 surveillance that the plaintiff variously operated a vehicle, entered and exited his vehicle, carried a large trash bag and a box (unspecified as to size) to a dumpster, walked his dog, carried his dog, conversed, and moved his head and neck freely, and repeatedly bent at the waist; however the actual September 2013 motion footage shows 1) the plaintiff entering and exiting his vehicle with difficulty; 2) walking stiffly and with slow stride; 3) briefly carrying the small Pomeranian dog stiffly and with difficulty and with both arms, and; 4) slow and hesitant and stiff movements throughout the footage; and 5) that the referenced "box" is merely an empty plastic salad container that could not weigh more than 10 grams.

XLV.

Consultant Zoltan cites the surveillance vendor's September 2013 report for Zoltan's conclusion that the plaintiff can sustain full time work because the plaintiff supposedly had no difficulty throwing the referenced "box" and "bag" into the dumpster; yet the trash bag in the actual motion footage reveals the plaintiff to be swing-dragging the bag with obvious difficulty to the dumpster even though the bag does not appear from the footage to weigh more than 5 to 8 lbs and the footage also depicts the plaintiff making two attempts with difficulty to lift the bag into the dumpster.

XLVI.

It is further apparent from the actual September 2013 motion footage that the plaintiff only dragged one bag, not the multiple "bags" suggested by Zoltan's June 19, 2014 report.

XLVII.

Zoltan's June 2014 report declares that the surveillance depicts the

1 plaintiff bending over to carry the bag, however the actual September 2013 footage
2 only depicts the plaintiff stiffly swing-dragging the bag and not discernibly bending.

3 XLVIII.

4 The actual motion footage from September 2013 confirms the dog is
5 merely a toy-breed and yet that the plaintiff still had difficulty carrying it and placing
6 it in the front seat of the SUV type vehicle, which was at waist level, and did not
7 require the bending that Zoltan's report suggests took place.

8 XLIX.

9
10 Consultant Zoltan cites supposedly fluid neck movements on
11 surveillance as a basis for his conclusion that the plaintiff could sustain full-time work,
12 yet the plaintiff's chief claimed impairment is lower (lumbar) spine injuries; further the
13 motion footage does not depict sudden or dramatic neck movements that contra-
14 indicate the plaintiff's diagnoses and claimed limitations.

15 L.

16 The September 2013 surveillance report only states that the plaintiff was
17 able to drive to and from his doctor appointment, but the actual motion footage shows
18 a slow and stiff entering into and operation of the vehicle.

19 LI.

20
21 The September 2013 surveillance report also describes on another
22 occasion the plaintiff exiting his apartment with his dog on his right arm and bending
23 at the waist but the actual footage shows the plaintiff carrying the dog with a slow
24 stride and no bending at the waist.

25 LII.

26 The surveillance vendor's written report of episodic footage over three
27 days in March of 2014 describes only the plaintiff sitting and/or walking while talking
28 on his cell phone and smoking on his patio and test-driving a vehicle for purchase;

1 but the actual motion footage shows the plaintiff walking and moving stiffly on his
2 patio, and appearing to be in pain with both sitting and standing and walking, and that
3 he is switching positions to relieve pain, moving slowly and bending only once and
4 slightly at the waist while looking at the vehicle for sale.

5
6 LIII.

7 The surveillance vendor's written report of episodic footage over a
8 couple of days in June of 2014 describes the plaintiff driving a vehicle into a remote
9 area and/or suggests the plaintiff was driving for a total of 55 minutes whereas the
10 actual motion footage only shows that the surveillance vendor lost track of the
11 plaintiff's vehicle for most of the alleged 55 minutes.

12
13 LIV.

14 The June 2014 written surveillance report alleges that the plaintiff's
15 girlfriend is observed acting in a "suspicious manner"; whereas the actual footage
16 only depicts her talking on a cell-phone on the sidewalk in front of the plaintiff's
17 apartment for a minute or so.

18
19 LV.

20 The June 2014 written surveillance report references only that the
21 plaintiff drove to the defense medical (Zoltan's) examination that United of Omaha
22 required him to attend but fails to acknowledge that the actual motion footage depicts
23 the plaintiff walking like a much older person in a slow stride both to and from the
24 examination building, which also contra-indicates Zoltan's report that an unnamed
25 Zoltan employee allegedly saw the plaintiff walking through the exam building's
26 parking lot without difficulty after the exam.

27
28 LVI.

Ultimately Defendant has substantially based its denials upon a gross
distortion of surveillance footage by Defendant's surveillance vendor, distortions

1 which were in turn relied upon by medical and vocational vendors hired by United of
2 Omaha whose reports were in turn relied upon by United of Omaha insurance
3 adjusters; surveillance footage which United of Omaha throughout the entire claim
4 and denial and appeal process concealed from the plaintiff despite the plaintiff's
5 repeated requests for this footage at every key point of the claim chronology; footage
6 which in actuality depicts only movements and observable limitations consistent with
7 and supportive of the plaintiff's claimed impairments and treatment records to such
8 a degree that the plaintiff could have himself cited in his appeal the subject
9 surveillance footage as further evidence supportive of his claimed condition,
10 restrictions and limitations.

11 LVII.

12 Since May 31, 2011, Anthony Fontana has been "totally disabled" as
13 such terms are defined in the subject Plans, inclusive of any waiting periods and has
14 remained under continuous medical care by physicians.

15 LVIII.

16 As a result of the issuance of the final May 29, 2015 denial, all
17 administrative remedies have been exhausted, and this matter is ripe for judicial
18 review.

19 LIX.

20 That the plaintiff requests the Court declare the rights and legal
21 obligations of the parties and declare that the Long Term Disability Plan constitutes
22 a binding and enforceable agreement. That the plaintiff prays for full relief for
23 accumulated and accumulating monthly benefits and interest through the conclusion
24 of litigation.

25 LX.

26 That this litigation is timely brought having followed within appropriate
27
28

1 and/or applicable time limitations the defendant's final denial and resultant exhaustion
2 of administrative remedies, and is appropriate for a Federal District Court deciding
3 Short Term and Long Term Disability issues per Section 502(a)(1)(B) of ERISA.

4
5 **Claim for Benefits Under ERISA**
6

7 **LXI.**

8 Defendant United of Omaha abused its discretion because its decisions
9 denying the plaintiff's disability benefits were arbitrary and capricious and have no
10 rational support in the evidence, and were caused or influenced by United of
11 Omaha's consultants' financial conflicts of interest and also by United of Omaha's
12 and/or the Plan(s)' own inherent financial conflict(s) of interest that arise from
13 Policyholder SHC's grant of discretion to Defendant United of Omaha to determine
14 eligibility for benefits and interpret all terms and provisions of the Policy. These
15 conflicts of interest have undermined the full and fair review required by ERISA, 29
16 U.S.C. 1133(2) and 29 C.F.R. §2560.503-1(g)(1) and (h)(2).

17 **LXII.**

18 Under the de novo standard of review, United of Omaha's decisions
19 were erroneous, contrary to the Plan(s) terms, and contrary to the medical and
20 vocational evidence.

21 **LXIII.**
22

23 Upon information and belief, United of Omaha, the Plans, and the
24 purportedly "independent" consultants Zoltan and Strassberg and United of Omaha's
25 other consultants who evaluated the plaintiff's subject claim also suffer from financial
26 conflicts of interest and bias all of which has precluded a full and fair review of the
27 plaintiff's claim.
28

LXIV.

As a rationale for denying benefits, Defendant United of Omaha has improperly favored said hired-consultants' conclusions over the conclusions of treating physicians; specifically that in reaching their conclusions, defendant United of Omaha's physician consultants failed to consider all of the plaintiff's signs, symptoms, impairments and limitations.

LXV.

That the defendant's consultants' opinions are so conclusory, unsubstantiated and against the weight of the evidence as to indicate that said consultants were improperly influenced by United of Omaha to support a benefits denial and/or that said consultants had a financial interest in supporting the claim denial in order to ensure repeat business, which infected the claims process and constitutes a procedural irregularity under ERISA that denied the plaintiff the full and fair review to which he is entitled.

LXVI.

That the plaintiff is entitled to discovery regarding the effects of the procedural irregularities evidencing conflicts of interest that occurred during the claims handling process and also regarding the effects of United of Omaha's consultants and United of Omaha's and/or the subject Plan's financial conflicts of interest upon the claim denials.

LXVII.

The defendant's misrepresentation of the contents of surveillance footage while at the same time denying Plaintiff's repeated requests to view the footage; and also the defendant's reliance in pertinent part for its final claim denial upon Defendant's newly presented medical opinions and theories, substantially refutable by Plaintiff if not denied the chance, are all present procedural irregularities

1 of such significance that the District Court may consider evidence outside the
 2 administrative record in order to fully develop the administrative record. *Aluisi v. Elliott*
 3 *Mfg. Co. Inc.*, 672 F. Supp. 2d, 1068, 1082 (E.D. Calif, 2009); *Burke v. Pitney Bowes*
 4 *Inc. LTD Plan*, 544 F.3d 1016, 1028 (9th Cir. 2008); *Abatie v. Alta Health & Life Inc.*
 5 *Co.* 458 F.3d, 955, 972-73 (9th Cir. 2006)

6 LXVIII.

7
 8 In light of the procedural irregularities and authority referenced in
 9 preceding paragraph LXVII, Plaintiff attaches to this Complaint the following
 10 additional evidence responsive to the issues newly raised by Defendant's final May
 11 29, 2015 denial and by Defendant's withholding of the surveillance motion footage:

12 1) Exhibit A: August 25, 2015 opinion of Plaintiff's occupational therapist (Mary
 13 Louise Hymen , MOT, OTR/L) regarding the contents of surveillance motion-footage
 14 and also her testing methodology; and

15 2) Exhibit B: June 29, 2015 correspondence from Aaron Rodarte PA-C of Arizona
 16 CPR, Plaintiff's treating pain-management provider, clarifying that the laboratory test
 17 cited by consultant Strassberg as evidence of supposed illicit drug use by Plaintiff
 18 reflects merely a false positive for the alleged illicit substance; and

19 3) Exhibit C: September 15, 2015 correspondence from Plaintiff Anthony Fontana
 20 attesting that he has not and does not use illegal drugs.

21 4) Exhibit D: October 7, 2015 toxicology screening from HealthCore Labs LLC,
 22 reflecting negative for illicit and/or illegal substances.

23 LXIX.

24
 25 That the plaintiff has been injured and has suffered damages in the form
 26 of lost LTD benefits as a result of the defendant's wrongful actions and decision to
 27 deny the plaintiff disability benefits.

1 LXX.

2 Pursuant to ERISA, 29 U.S.C. § 1132, the plaintiff is entitled to recover
3 unpaid disability benefits, prejudgment interest, reasonable attorney's fees, and costs
4 from Defendant and/or is entitled to an order enforcing his right to disability benefits
5 under the subject LTD plan.

6 LXXI.

7
8 As a direct and proximate result thereof, based upon the evidence
9 submitted by Plaintiff to Defendant establishing that Plaintiff has met the LTD Plan's
10 requisite disability definitions continuously since May 31, 2011, Plaintiff is entitled to
11 his monthly disability insurance payments retroactive to the subject denial date of
12 August 28, 2014.

13 LXXII.

14 The plaintiff has further been injured and suffered damages by losing
15 other benefits to which he may have been entitled under his employer's
16 ERISA-governed benefits plans.

17 LXXIII.

18 Upon information and belief, that Group Control Number GUD-09P58
19 also contains a waiver of premium benefit on certain life insurance benefits and
20 policies to which the plaintiff is entitled if disabled as alleged in the causes of action
21 heretofore, and that in connection with the denial of the subject LTD benefits, the
22 plaintiff was notified that he no longer met eligibility requirements for said premium
23 waiver and therefore has already lost or soon will lose the substantial ERISA benefit
24 of said life insurance policies.

25 LXXIV.

26
27 That the Defendant, United of Omaha, the Plans and Employer SHC,
28 stand as fiduciaries to one another and to the plaintiff, and each has the power to

1 bind the other, as agent.

2 LXXV.

3 That the actions of Defendant are a breach of contractual and/or
4 fiduciary duties inuring to the subject Plan pursuant to the requirements of 29 U.S.C.
5 §502(a)(1)(B).
6

7 LXXVI.

8 That the defendant's actions are an unwarranted breach of the subject
9 Long Term Disability Plan, representations by Plan(s)' documents, ERISA, and the
10 contract(s) of insurance, and have caused and continue to cause the plaintiff great
11 financial hardship. That the plaintiff meets the subject and requisite disability
12 definition(s) and provisions of his "own" and/or "any" occupation policy provisions of
13 the subject LTD Plan, with special essential duties and hourly provisions.

14 LXXVII.

15 That the plaintiff's damages are at least \$41,773.62 to date and
16 accumulating, currently calculated under the subject Plan as \$5,182.73 (66.67% of
17 a \$7,773.70 gross monthly salary) offset by the monthly Social Security Disability
18 benefits of \$2,198.90 per month, leaving a net LTD monthly benefit of \$2,983.83,
19 multiplied by the approximate 14 months elapsed thus far since August 28, 2014, the
20 date after which the defendant United of Omaha denied further benefit payments.
21
22
23

24 WHEREFORE, the Plaintiff prays judgment as follows:

25 A. For a judgment for benefits and an Order such benefits continue, per ERISA,
26 including 29 U.S.C. § 1132(g)(2).

27 B. For \$2,983.93 per month for LTD benefits from August 28, 2014 and ongoing,
28 through judgment and post-judgment as appropriate, and all monthly payments and

1 accumulated interest due from day of judgment.

2 C. For declaratory judgment granting Plaintiff all rights and benefits under the written
3 Policies/Plans, and to award the plaintiff a money judgment for all sums due and
4 owing with interest from time of breach; and/or an order enforcing the plaintiff's right
5 to benefits under the subject Plans;

6 D. For all other damages as may be just and proper under Arizona State law or
7 developing ERISA and/or other Federal case and statutory law.

8 E. For attorney fees, pursuant to ERISA, see 29 USC § 1132(g)(1).

9 F. For appropriate relief under 29 USC § 502(a)(1)(B), to redress such violations, or
10 to enforce any provision of this title or the terms of the Plans.

11 G. For reimbursement for any funds paid by Plaintiff or due the plaintiff for the
12 continuation of life insurance policies as an employee benefit dependent upon
13 STD//LTD-eligibility on behalf of the plaintiff and any dependents, and, in the
14 eventuality of death during the pendency of this litigation, to full payment on all
15 policies to the named beneficiaries.

16 H. For costs and disbursements of this action and interest on all sums owed until
17 payment.

18
19
20
21 DATED this 26th day of October 2015

22 THE LAW OFFICE OF PAUL J. DOMBECK, PLLC

23
24 By s/ Paul J. Dombeck

25 PAUL J. DOMBECK, ESQ.
26 18444 North 25th Avenue, Ste 420
27 Phoenix, Arizona 85023
28 Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2015, I electronically transmitted the attached documents to the Court Clerk's Office using the CM/ECF System for filing and transmittal of a Parties' Civil Coversheet, Summons and Complaint, and Exhibits.

s/ Paul J. Dombeck

Paul J. Dombeck